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IN THE

Supreme Court of the United States

October Term, 1961

No. 167

ROY A. OAKLEY,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No.

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—against—

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Roy A. Oakley, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on May 24, 1961.

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit (reproduced in Appendix I) is not yet reported. The United States District Court for the Middle District of Tennessee, Nashville Division, wrote no opinion.

Jurisdiction

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 24, 1961. On June

13, 1961 that court entered an order staying the issuance of mandates, pending an application to the United States Supreme Court for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Is 18 U.S.C.A. §1461, as amended in 1958, 72 Stat. 962, so vague and indefinite that it does not meet the due process requirement of the Fifth Amendment?

2. Are the petitioner's pictures, consisting of female nudes, obscene within the meaning of *Roth* v. *United States*, 354 U. S. 476 (1957), and *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958), reversing 249 F. 2d 114 (D. C. Cir. 1957)?

3. Should the fact that the defendant in good faith believed his pictures to be not obscene be taken into account in determining his guilt or innocence?

Constitutional and Statutory Provisions Involved

Fifth Amendment:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

18 U.S.C.A. §1461, as amended in 1958, 72 Stat. 962:

> "* * * Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it

is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter. * * *"

Statement of the Case

The petitioner was convicted on nine counts of a ten-count indictment (count seven withdrawn), and on a single count of a one-count indictment, charging him with violations of 18 U.S.C. §1461, after a trial before United States District Judge William E. Miller and a jury. Judge Miller sentenced the petitioner to two years imprisonment on each count, all sentences to run concurrently. The United States Court of Appeals for the Sixth Circuit on May 24, 1961 affirmed the Judgment of conviction.

The defendant is a native born American who lived his first six years at Allgood, Tennessee, and since then, except for periods in our Marines, in Gallatin, Tennessee (4a) (references are to pages of petitioner's appendix in the Court of Appeals). He lives with his parents, both of whom are still living (9a). He was in the United States Marines for eleven years, of which seven and one-half years were on active duty from February 1941 to March 1947 and from October 1950 to March 1952 (4a, 6a). He was in the South Pacific from about May 1942 to December 1944 (5a). He was through three campaigns in the Pacific; Guadalcanal, from August to December 1942; New Britain Island

in 1943; and Peleliu Island in September and October 1944 (5a). In these various places he saw thousands of pictures of pin-up girls, which served as morale builders for the troops (5a). He has two honorable discharges, the first one of which he received in March 1947 and the second in March 1952 (6a).

The defendant is a professional photographer (6a). He has been a photographer for 13 years as a civilian (6a). While he was in the service he worked for the camp newspaper at Parris Island, South Carolina for about four or five months, and had several hundred pictures printed during that time (6a).

From 1947 through 1950 the defendant did freelance photography in Gallatin, and sent several pictures to the Nashville papers that were printed, and some in the local papers (7a). He also took 100 of the approximately 102 photographs that appear in a published history of Sumner County (7a). The defendant's home city of Gallatin is in Sumner County (7a). The defendant's business, which is in Gallatin, Tennessee, included the sale of unretouched artistic photographs of the human female nude for the artist, photographer, collector, connoisseur, and nudist. He sold his photographs only to those who certified that they were over 21-years of age.

The defendant never had any intention of violating any statute or of sending any obscene material through the mails. Based on his experience on what he saw while he was in the Marines, what he saw on the newsstands thereafter, and what he received through the mail, particularly various issues of the nudist publications *Sunshine & Health* and *Sun Magazine* he thought, as the courts have stated,

that nudity *per se* was not obscene, and that all of the pictures which he mailed had artistic merit and were not obscene. That is still his position.

During the course of the trial the defendant introduced as evidence of contemporary community standards various representations of numerous nudes in Nashville, Tennessee. He also introduced various issues of a number of periodical publications containing nudes, such as *Time, Life, Gent, Ace, Rouge, Nugget, Playboy, Modern Man, Escapade,* as well as the nudist magazines *Sunshine & Health* and *Sun Magazine,* all of which contained reproductions of the human nude, females as well as males, with many pictures showing nude females and males in the same pictures. He further introduced two volumes of the *Encyclopaedia Britannica* with similar reproductions, as well as various books and pieces of statuary. It is submitted that taking into account contemporary community standards, and the defendant's own intent and conduct, it should be held that he did not violate 18 U.S.C. §1461.

Reasons for Granting the Writ

I.

The Court of Appeals for the Sixth Circuit in holding that the 18 U.S.C.A. §1461, as amended in 1958, 72 Stat. 962, to be constitutional decided an important question of federal law which has not been, but should be, settled by this Court.

A.

The amendment of August 28, 1958, 72 Stat. 962, makes 18 U.S.C.A. §1461 so vague and indefinite that it does not meet the due process requirement of the Fifth Amendment.

All statutes must be reasonably definite. This is a general due process requirement for all legislation, whether federal or state, whether civil or criminal. Moreover the standards of certainty in statutes with criminal sanctions are more exacting than those with civil ones only. As the United States Supreme Court pointed out many years ago in *United States* v. *Reese*, 92 U. S. 214 (1876), through Chief Justice Waite: " . . . Every man should be able to know with certainty when he is committing a crime." At 220.

Or as the Court ruled more recently in *Winters* v. *New York*, 333 U. S. 507 (1948), reversing 294 N. Y. 545, 63 N. E. 2d 98 (1945), through Justice Reed:

> " . . . The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness.' • • • There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. . . ." At 515.

Or yet again as the Court ruled in *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939):

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. (Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 242, 243; Connally v. General Constr. Co. 269 U. S. 385, 391-393; A. B. Small Co. v. American Sugar Ref. Co., 267 U. S. 233, 239; United States v. L. Cohen Grocery Co., 255 U. S. 81, 89-92; Collins v. Kentucky, 234 U. S. 634, 638; International Harvester Co. v. Kentucky, 234 U. S. 216; Cf. People v. Belcastro, 536 Ill. 144; People v. Licavoli, 264 Mich. 643.) The applicable rule is stated in Connally v. General Constr. Co. 269 U. S. 385, 391, 70 L. ed. 322, 328, 46 S. Ct. 126: 'That the terms of the penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' "

There are many additional cases to the same effect: *Champlin Refining Co.* v. *Corporation Comm'n.*, 286 U. S. 210 (1932); *Smith* v. *Cahoon*, 283 U. S. 553 (1931); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927); *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926); *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921); *Collins* v. *Kentucky*, 234 U. S. 634 (1914); *International Harvester Co.* v. *Kentucky*, 234 U. S. 216 (1914); cf. *Watkins* v. *United States*,

354 U. S. 178 (1957); *United States* v. *Cardiff*, 344 U. S. 174 (1952); *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 Cornell L. Q. 195, 214-18 (1955); Note, *Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77, 85-86 (1948).

The 1958 Amendment to 18 U.S.C.A. §1461 makes the pertinent part read:

> "Whoever • • • knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed • • •."

This language is too vague and indefinite to meet the due process requirement of the Fifth Amendment.

B.

Moreover, "criminal statutes are to be strictly construed." *Yates* v. *United States*, 354 U. S. 298, 310 (1957).

A further circumstance bearing on the treatment to be accorded to 18 U.S.C.A § 1461, as amended in 1958, is that penal laws are to be strictly construed. On this point Chief Justice Waite in the leading case of *United States* v. *Reese*, 92 U. S. 214, had this further observation:

> "This is a penal statute and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used. • • •"

There are a multitude of cases to the same effect. For instance, in the recent case of *Yates* v. *United States*, 354

U. S. 298 (1957) this Court held that the word "organize" in the Smith Act referred "only to acts entering into the creation of a new organization, and not to acts thereafter performed in carrying on its activities, even though such acts may loosely be termed 'organizational.'" At 310.

Strictly speaking, 18 U.S.C.A § 1461, as amended in 1958, no longer has any clearly ascertainable meaning.

II.

The Court of Appeals for the Sixth Circuit in affirming the instant judgment of conviction, and the United States District Court for the Middle District of Tennessee, in letting the instant case go to the jury, applied a standard of obscenity in conflict with that which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957), and *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958).

A.

The Supreme Court's prurient interest test for obscenity is a very narrow one.

The Supreme Court's test for obscenity, as laid down in *Roth* v. *United States*, 354 U. S. 476 (1957) is a very narrow one. Only that material is obscene which deals with sex in a manner appealing to the prurient interest of the average person in the community. At 487, 489.

At the 1957 Term, the Court perused the nudist publications *Sunshine & Health* and *Sun Magazine*, and determined them to be not obscene. *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958), reversing 249 F. 2d 114 (D.C. Cir. 1957), affirming 128 F. Supp. 564 (D.D.C. 1955).

At the same term the United States Supreme Court took a similar approach with reference to the motion picture film "The Game of Love," *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35 (1957), reversing 244 F. 2d 432 (7th Cir.), affirming 139 F. Supp. 837 (D. N. D. Ill. 1956). The Supreme Court viewed the film, decided that it was not obscene, and reversed the court below.

At the same Term the Court also gave favorable rulings for individuals in two further cases. In one of these, *One Inc.* v. *Olesen*, 355 U. S. 371 (1958), reversing 241 F. 2d 772 9th Cir. 1957), the Court held a magazine called *One*, which was beamed at homosexuals, to be not obscene.

In a fourth case at the same Term, *Mounce* v. *United States*, 355 U. S. 180 (1957), vacating judgment in 247 F. 2d 148 (9th Cir. 1955), affirming *United States* v. *2400 Copies International Journal*, 34 F. Supp. 490 (D. E. D. Wash. 1955), which involved nudist periodicals as well as two publications which contained only reproductions of human nudes without any text at all, the Court after a confession of error by the Solicitor General, vacated the judgment of the court below and remanded the case to the district court for reconsideration in the light of the *Roth* case. The district judge had included in the standard of obscenity which he had applied that which "offends the sense of propriety, morality, and decency of" the average person of the community. The Court of Appeals for the Ninth Circuit had adopted the district court's standard. But the Supreme Court had laid down the prurient interest test. When this case returned to the district court, the judge held all the publications there involved, even those solely with pictures and without any text at all, to

be not obscene. Civil No. 1286, D. E. D. Wash., August 15, 1958.

On the last day of the next term, June 30, 1959, the Court took similar action with reference to the film "Lady Chatterley's Lover," *Kingsley International Pictures Corp.* v. *Board of Regents*, 360 U. S. 684 (1959). All of the justices, except Mr. Justice Black, viewed the film.

In addition, it is interesting to note that at the last three terms the Court has not found anything to be obscene, whether it be nudist magazines, or motion picture films or a publication beamed at homosexuals. Also the Court has so far lifted the ban on every film to come to court. The list includes "The Miracle," *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952), reversing 303 N. Y. 242, 101 N. E. 2d 665 (1951); "The Moon Is Blue," *Hilsby Productions, Inc.* v. *Vaughan*, 350 U. S. 870 (1955), reversing 177 Kan. 728, 282 P. 2d 412; "The Game of Love," *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35 (1957), reversing 244 F. 2d 432 (7th Cir. 1957), affirming 139 F. Supp. 837 (D. N. D. Ill. 1956; "La Ronde" (a picture made from Arthur Schnitzler's "Reigen"), *Commercial Pictures Corp.* v. *Board of Regents*, 346 U. S. 587 (1954), reversing 350 N. Y. 336; 113 N. E. 2d 502 (1953); "Native Son" and "M," *Superior Films* v. *Dept. of Education*, 346 U. S. 587 (1954), reversing 159 Ohio St. 315, 112 N. E. 2d 311 (1953); "Pinky," *Gelling* v. *Texas*, 343 U. S. 960 (1952), reversing 157 Tex. Cr. 516, 247 S. W. 2d 95; and "Lady Chatterley's Lover," *Kingsley International Pictures Corp.* v. *Board of Regents*, 360 U. S. 684 (1959), reversing 4 N. Y. 2d 349, 175 N. Y. S. 2d 39 (1958), reversing 4 A. D. 2d 348, 165 N. Y. S. 2d 681 (3d Dept. 1957).

B.

In *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958), the Court recognized that representations of the human nude, without more, are not obscene.

Because of our long history with the human nude in various art forms, and more recently in numerous other forms, our courts have frequently stated that nudity per se is not obscene. See *e.g. Parmelee* v. *United States*, 113 F. 2d 729, 732 (D. C. Cir. 1940); *Maryland State Board* v. *Times Film Corp.*, 212 Md. 454, 129 A. 2d 833, 838 (1957); *People* v. *Muller*, 96 N. Y. 408, 411 (1884); *People* v. *Gonzales*, 107 N. Y. S. 2d 968, 969 (1951); *Commonwealth* v. *Hueston*, The Legal Intelligencer, Oct. 26, 1956, 25 U. S. Law Week 2193, 2194 (1956).

Accordingly many cases have held that various portrayals of the human nude were not obscene. See *e.g. Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir. 1940) (Parmelee's book, Nudism in Modern Life); *Sunshine Book Company* v. *Summerfield*, D. D. C. Civil Action No. 3007/53, July 13, 1953, affirmed 221 F. 2d 43 (1954), cert. denied, 349 U. S. 921 (1955) (numerous issues of the nudist periodicals *Sunshine & Health* and *Sun Magazine*); *State* v. *Lerner*, 51 Oh. L. Abs. 321, 81 N. E. 2d 282 (1958) (seven issues of the nudist periodical *Sunshine & Health*); *LeBaron* v. *Olesen*, 125 F. Supp. 53 (S. D. Cal. 1954) (Marilyn Monroe coasters); *In the Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237, 144 N. E. 2d 31 (1957), affirming 2 A. D. 2d 941, 156 N. Y. S. 2d 200 (1956) (nudist film *Garden of Eden*); *Matter of Capital Enterprises* v. *Regents*, 1 A. D. 2d 990, 149 N. Y. S. 2d 920 (1956) (motion picture *Mom and Dad*, depicting human birth); *Mary-*

land State Board v. *Times Film Corp.*, 212 Md. 454, 129 A. 2d 833 (1957) (film *Naked Amazon*, showing Camyura Indians in the jungles of Brazil, who live entirely unclothed); *American Museum of Natural History* v. *Keenan*, 20 N. J. Super. Ill. 89 A. 2d 98 (1952) (film *Latuko*, which depicts the life of a nude African Tribe); *Commonwealth* v. *Hueston, The Legal Intelligencer*, Oct. 26 1956, 26 U. S. L. Week 2193 (Photographs of the human nude).

The nudist film *Garden of Eden*, according to the Court of Appeals of New York, "has been shown in 36 States and in many foreign countries." *In the Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237, 239, 144 N. E. 2d 31, 32 (1957).

Indeed in both the *Mounce* and the *Sunshine Book Company* cases the district courts observed that nudity *per se* was not obscene. In the *Mounce* case *sub nom. United States* v. *4200 Copies International Journal*, 134 F. Supp. 490 (D. E. D. Wash. 1955), the federal district judge stated: "Nudity is not per se obscene." At 493. In the *Sunshine Book Company* case the federal district judge said:

> "First and foremost, nudity is not obscene, per se." 128 F. Supp. 564, 569.

However, neither they nor the Courts of Appeals were able to follow through on these observations. Their errors in this regard the United States Supreme Court corrected, by vacating the judgment of the Court of Appeals for the Ninth Circuit, and by reversing the judgment of the Court of Appeals for the District of Columbia Circuit.

C.

The decisions holding nudity to be not obscene result from the fact that the human nude has been with us in art for more than twenty-five centuries and in many other forms more recently.

We have had representations of the human nude, both male and female, separately and together, in sculpture and painting for more than 2500 years. In this history the Greeks took the first steps. They produced monumental statues of naked youths beginning about the middle of the seventh century B.C. Since then we have had so many examples of the human nude in sculpture and painting that they are too numerous to mention. Human nudes in sculpture, painting and other forms are on exhibition in various museums throughout the country. They have been produced in such widely disseminated publications as the *Encyclopaedia Britannica, Time, Life* and in numerous books on art.

The latest edition of the Encyclopaedia Britannica (1952) in its articles on *Sculpture* and *Sculpture Technique* contains reproductions of Michelangelo's *Slave,* vol. 20, Plate VII, opp. p. 230, and *Evening,* Plate X, Roden's *The Kiss,* Plate VII, opp. p. 198, and *The Bronze Age,* Plate X, opp. p. 230, Donatello's *David,* Plate IV, opp. p. 198, Arthur Lee's *Dawn,* Plate XVII, and *Rhythm,* Plate XI, opp. p. 230, and Maillol's *Torso,* Plate XII. In its article on painting this work contains reproductions of Botticelli's *The Birth of Venus,* vol. 17, Plate VI, Correggio's *Mercury Instructing Cupid before Venus,* Plate VIII, Rubens' *Venus and Adonis,* Plate X, and Titian's *Woman on a Couch,* Plate VIII. The earlier edition of this work in its articles on *Sculpture* and *Sculpture Technique* carries additionally Michelangelo's *Evening,* vol. 20, Plate V, opp. p. 224, Mail-

lol's *Danae,* Plate XIX, opp. pp. 216-217, and Rodin's *Eternal Springtime,* Plate VIII, opp. 226-227 (15th ed. 1937). This edition on painting also shows one of Matisse's *Odalisques,* vol. 17, Plate XVI.

Life magazine reproduced Michelangelo's *The Creation of Man,* Dec. 26, 1959, pp. 25-48, Botticelli's *The Birth of Venus,* Velasquez's *Lounging Venus,* Correggio's *Awakened Danae,* Manet's *Unblushing Olympia,* Titian's *Bathing Goddess,* Rubens' *Three Graces,* Courbet's *Realist Bather,* Renoir's nude painting of his wife, and a nude piece of sculpture by Praxiteles, Oct. 22, 1956, pp. 102-111.

Time reproduced a picture of Michelangelo's statue *David,* March 4, 1946, p. 99; Tintoretto's *Minerva Pursuing Venus,* June 11, 1956, p. 85; and Lucus Cranach's *Adam and Eve,* April 23, 1956, p. 87.

Reference may also be made to some of the numerous recent works on art containing reproductions of the human nude. See e.g. Kenneth Clark, *The Nudes A Study In Ideal Form* (1953); R. Lulies and M. Hirmer, *Greek Sculpture* (Michael Bullock transl. 1957); O'Malley and Sanders, *Leonardo da Vinci on the Human Body* (1952); Rodin (Phaidon 1951); Goldschneider, *The Sculptures of Michelangelo* (2d ed. 1950); Goldschneider, *The Paintings of Michelangelo* (2d ed. 1948); Martinie, *Rodin* (1947).

More recently representations of nude human figures have occurred in other fields than sculpture and painting. Such representations, of both male and female figures, have come to be used pretty freely in almost any field, and to illustrate almost any text. They are used in etching and photography. They are used in medical treatises and jour-

nals. They are used in text books and periodicals. They are used in various works giving sexual instructions and advice.

Almost two decades ago the court in *Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir. 1940) thus summarized the situation at that time.

> "Nudity in art has long been recognized as the reverse of obscene. Art galleries, and art catalogues contain many nudes, ancient and modern. Even such a conservative source book as the Encyclopaedia Britannica, contains nudes, full front view, male and female, and nude males and females pictured together and in physical contact.
>
> "The use of nude figures and photographs in medical treatises and textbooks is also commonly practiced today. * * * " At 734.

Representations of the human nude have increased still more since the time of that opinion. Indeed they have increased substantially. Various of the publications we have cited attest to this fact. So do numerous other events. Such a tightly self-censored group as the movie industry, in the December 11, 1956 revision of its Production Code, permitted the filming of nude infants. The magazine *Variety*, in its October 7, 1957 issue had a front page story about a nudist colony on commercial television in Great Britain. The article tells us "the femme members of the Colony wore big smiles, little earrings—and that's all." In the same month there were two art exhibits in New York City featuring the human nude. One of these showed the nudes of Nicholas Marsicano; the other presented a survey of nudes including works of Renoir, Titian, Picasso, Chagall, Tiepolo Giacometti, Maillol, Boucher, and Schaffner. N. Y.

Times, Oct. 22, 1957, p. 30; 2-3; N. Y. Times, Oct. 30, 1957, p. 23; 2-3. Of the later exhibit art critic Dore Ashton wrote in The New York Times:

> "In 'Nudes Through the Ages' at the Delius Gallery, 24 East Sixty-seventh Street, visitors will see that the human body has been a faithful muse, always presenting new possibilities for expression to the attentive and passionate artist.
>
> "The nude creates a division in art history of its own, a 'subject' classification that offers ideal circumstance for comparative appraisal. There have always been artists, it appears, who thought of the nude as an interesting form, no more no less. In the early Renaissance, those artists made routine crosshatch studies in which they expressed only the rationalized volumes of muscle and bone and little else. In more recent periods, artists interested solely in inanimate metaphors such as the hackneyed female nude—equals—violin.
>
> "These formal drawings prove a minor order when cast together with works by artists who have seen in the nude an inexhaustible symbol of life—of all life, that is . . ." October 30, 1957, p. 23, col. 2.

Yet more recently one of England's leading newspapers prominently displayed the picture of a nude woman taken beside a park statue. Truly the human nude has come to be culturally and judicially accepted as one of the ordinary facts of life.

III.

The courts below in refusing to take into account the good faith of the petitioner in believing his pictures to be not obscene, decided a federal question in a way in conflict with the application decisions of this Court.

The petitioner never had any intention of violating the law. He never had any intention of sending obscene material through the mail.

For many years the petitioner was in the United States Marines. While in the Marines he saw a multitude of pictures of pin-up girls. Since that time he has seen pictures of many nudes in various publications. These publications were not only sold on newstands but also sent through the mails. He particularly observed the many nudes in various issues of the nudist publications *Sunshine & Health* and *Sun Magazine*. He accordingly thought, as the courts have repeatedly stated, that nudity per se was not obscene. If that was true, and if nudist publications were sold, not only on newstands but also went through the mails, he felt that his conduct was entirely legal. As the petitioner explained when Judge Miller called upon him just before sentencing him: "Your honor, I certainly don't feel that I have done anything wrong. I have always felt that the pictures that I sold didn't exceed those in the nudist publications, and that's about the only thing I can think of this moment." (98a).

These circumstances should have been taken into account. As Mr. Chief Justice Warren explained in his concurring opinion in the leading case of *Roth* v. *United States*, 354 U. S. 476, 495 (1957):

> "The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them. It is manifest that the same object may have a different impact, varying according to the part of the community it reached. But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting."

Reference may also be made to ALI Model Penal Code §207.10(7), comment at 49-51 (Tent. Draft No. 6, 1957). Based on this provision, federal District Judge William C. Mathes, suggested the following jury instruction on good faith and belief as to obscenity:

> "Even though you may find one or more of the pictures involved in the indictment to be obscene, if you should further find that the accused in good faith believed, at the time of any mailing, that such picture or pictures were not 'obscene', then you should find that the defendant did not act with specific intent, and so should acquit him." 27 F. R. D. 157-58 (1961).

CONCLUSION

Since the Court of Appeals for the Sixth Circuit decided an important question of federal law which has not been but which should be settled by this Court, namely that 18 U.S.C. §1461 as amended on August 28, 1958, 72 Stat.

962, did not violate the due process clause of the Fifth Amendment; and since the Court of Appeals for the Sixth Circuit applied a standard of obscenity in conflict with that which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957); and *Sunshine Book Company* v. *Summerfield*, 355 U. S. 372 (1958), this petition for a writ of certiorari should be granted.

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APPENDIX

Opinion of United States Court of Appeals

Nos. 14338-9

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROY A. OAKLEY, *Defendant-Appellant.*	APPEAL from the District Court of the United States for the Middle District of Tennessee, Nashville Division.

Decided May 24, 1961.

Before MARTIN, CECIL and O'SULLIVAN, Circuit Judges.

O'SULLIVAN, Circuit Judge. Defendant-Appellant, Roy A. Oakley, was convicted by a jury on nine counts of a ten-count indictment, each of which counts charged him with violation of Section 1461, Title 18, U. S. C. A. (using the mails to distribute, or to give information as to a source from which could be obtained, obscene, lewd, lascivious and indecent articles or things). He was also convicted on the same trial under a one-count indictment charging violation of the same statute. The violations charged in the first indictment were alleged to have occurred prior to a 1958 amendment to Section 1461 of Title 18, and the single count indictment charged a violation alleged to have occurred

after the effective date of such amendment. The district judge denied motions to dismiss the indictments and for acquittal, entered judgments on the verdict, and sentenced appellant to two years imprisonment on each count, all sentences to run concurrently.

On this appeal, defendant relies upon the following contentions: first, that the 1958 amendment to Section 1461 of Title 18, U. S. C., is unconstitutional; second, that the materials involved in appellant's mailings were, as a matter of law, not obscene and that the district judge was therefore in error in submitting such question to the jury; and, third, that appellant, from his experience with what is currently available in magazines, movies and like media of community information and entertainment, had become convinced that what he was doing was all right—he "never had any intention of violating the law."

First. *Constitutional question.* The offenses charged in the ten-count indictment occurred prior to the effective date (August, 1958) of the amendment under question. Only the single-count indictment is, therefore, subject to this attack. Prior to the amendment, the relevant language of Section 1461 read, "Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable," etc. This was changed by the 1958 amendment to read, "Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, *or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered* by the person to whom it is addressed," etc.

Appellant says that the italicized portion of the above "is not only vague and indefinite, it is meaningless," and, therefore, offensive to the Fifth and Sixth Amendments. The indictment averring an offense committed after the 1958 amendment, charged that on November 22, 1958, appellant "did knowingly cause to be delivered by mail, according to the directions thereon" an obscene picture, giving the name and address of the person to whom it was alleged to have been delivered. We are satisfied that appellant was thereby clearly informed of the offense with which he was charged, and that the statute whose language was thus employed was not infected with any constitutional infirmity. *United States* v. *Petrillo*, 332 U. S. 1, 7, 8; *Collier* v. *United States*, 283 F. (2) 780, 781 (C. A. 4, 1960), cert. denied, 81 Sup. Ct. 746.

Second. *Were defendant's wares not obscene, as a matter of law?* Defendant's argument converts this question into an inquiry as to whether representations of the human nude are, per se, obscene. That is not the matter for decision. In testing whether the district judge should have directed defendant's acquittal, we must determine whether defendant's merchandise was of such character that it was permissible for a jury, "applying contemporary community standards" to find that "the dominant theme of the material, taken as a whole, appeals to prurient interest." *Roth* v. *United States*, 354 U. S. 476, 489.

The material which defendant advertised and sold consisted, in the main, of photographs (not retouched to obscure any detail) of naked young women. The subjects were so posed and slight apparel so added on some of the

pictures, as to enhance the prurient response invited. Defendant's advertising material gave subtle assurance that lustful curiosity would be satisfied by purchase of his material. The market solicited was not limited to persons of discriminating and artistic tastes, or to those whose look at the pictures would be prompted by some scientific or professional concern. No complaint is made of the instructions under which the district judge submitted the case to the jury. We find that it was not error for the district judge to submit the question of defendant's guilt to the jury.

Third. *Should defendant be held to have meant no wrong?* Defendant told of pictures seen by him while in the service. He introduced numerous publications and made reference to other media of information and entertainment currently available to the view of the public. He argues that his material was no worse than these. From his experience with these matters, he was persuaded, he says, that his enterprise was not illegal, and criminal intent was absent. We need not here pass upon the relative merits, or demerits, of defendant's wares and what may be obtained elsewhere. We decline to hold that contemporary sophistication has reached a point whereby to provide this defendant, or anyone else, with a license to prosecute the business of disseminating obscenity. It was for the jury here, under proper instructions and applying "contemporary community standards" in the context of defendant's conduct, to determine his guilt.

Judgments affirmed.